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Filed May 18, 1901.

IN THE

Supreme Court of the United States.

The Lake Street Elevated Railroad Company, *Plaintiff in Error,* vs. The Farmers' Loan and Trust Company, The American Trust and Savings Bank and The Northern Trust Company, *Defendants in Error.*	In Error to the Supreme Court of Illinois.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR TO AFFIRM.

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ATTORNEY FOR PLAINTIFF IN ERROR.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States

The Lake Street Elevated Railroad Company, *Plaintiff in Error,* *vs.* **The Farmers' Loan and Trust Company, The American Trust and Savings Bank and The Northern Trust Company,** *Defendants in Error.*	In Error to the Supreme Court of Illinois.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR TO AFFIRM.

The defendant in error, the Farmers' Loan and Trust Company, has presented to the court a motion—

1. To vacate the supersedeas granted in this cause.

2. To dismiss the writ of error granted in this cause.

3. To affirm the judgment of the Supreme Court of Illinois on the ground that the said writ of error was taken for delay only and that the question brought up by the writ is so frivolous as not to need further argument.

The writ of error in this case was allowed by Mr. Justice Brown on the 23rd day of April, 1901, and directed the clerk of the Supreme Court of Illinois to transmit the record to this court within thirty days from that date. On the 4th day of May, 1901, the defendant

in error, the Farmers' Loan and Trust Company, served notice upon counsel for plaintiff in error that on the 13th day of May, at the opening of court, they would present the motions above referred to, and at the same time delivered to us printed copies of said motions and suggestions in support thereof and of printed parts of the record relating to said motion. The printed parts of the record referred to consist of the mandate of this court to the Supreme Court of Illinois, the order of the Supreme Court of Illinois entered upon said mandate, the motion of the plaintiff in error for leave to file a supplemental transcript in the Supreme Court of Illinois (made on the ground that it was material to be considered on the hearing of the motion made by the Farmers' Loan and Trust Company for a mandate in accordance with the mandate of the Supreme Court of the United States), the petition for writ of error and the assignment of errors.

It is impossible to discuss the questions involved in this motion in the absence of certain parts of the record not printed by the defendant in error. The question to be determined on this writ of error is whether the Supreme Court of Illinois erred in remanding the cause to the Superior Court of Cook County, Illinois, under the mandate of this court, with directions to dismiss the bill of complaint, thereby setting aside not only that part of the decree reversed by this court, but also other parts of the decree which stand affirmed.

In order to show that this writ of error has not been taken out for delay and that the questions presented are not frivolous, it is necessary for the court to have before it the bill of complaint, the original decree entered in the Superior Court, the proceedings had in the cause after

this decree was affirmed by the Supreme Court of Illinois and before any writ of error was sued out by the Farmers' Loan and Trust Company. All of these things must be considered and the opinion of this court read in the light of all the facts in the case and the questions actually passed upon. As counsel has not printed such parts of the record as it is necessary for the court to consider in passing on the motions, the court should not at this time consider the merits of the case, but allow us to make the full argument that we deem necessary on the hearing of the case. We think it is clear, however, that none of the motions made by the defendant in error should be sustained.

I.

THE MOTION SHOULD BE DENIED FOR THE REASON THAT THREE WEEKS' NOTICE THEREOF, AS REQUIRED BY THE RULES, HAS NOT BEEN GIVEN COUNSEL FOR PLAINTIFF IN ERROR.

Rule 6 of this court provides that all motions to dismiss writs of error and appeals, except motions to docket and dismiss under rule 9, must be submitted at the first instance on printed brief or arguments, and that the party moving to dismiss shall serve notice of the motion with a copy of his brief or argument on counsel for plaintiff in error of record in this court at least three weeks before the time fixed for submitting the motion in all cases except when counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least sixty days.

The rule is plain that before this application can be presented to the court by the defendant in error at least three weeks' notice thereof should have been given us. As

a matter of fact but nine days' notice was given, and the motions should on that ground be denied. We made a motion to be allowed the time allowed by the rules to file a brief in opposition to the motions. The court having granted us five days' time we shall present the matter as best we can within the limited time.

II.

THE MOTIONS SHOULD BE DENIED FOR THE REASON THAT THE TRANSCRIPT HAS NOT YET BEEN FILED IN THIS COURT AND THE PARTS THEREOF NECESSARY TO BE CONSIDERED ON THESE MOTIONS PRINTED.

It is said by counsel for defendant in error that before they had prepared their suggestions they had been informed by a letter from counsel for plaintiff in error that the record was then on its way to Washington, in accordance with the practice in such cases, but that since writing the suggestions they had been informed by that counsel that he did not intend to file the record in time for these motions. The letter referred to was not intended to and did not in fact mislead counsel in any way, and this attempt to put us in a false position before the court is petty. The letter, it appears, was written April 25th. That was the day before the writ of error was lodged in the office of the clerk of the Supreme Court of Illinois, and counsel could not have understood that the record was then actually in transit. It was said in the letter—and counsel knew and understood the letter to mean —that the writ of error had been sent to the clerk of the Supreme Court of Illinois, who would send the record in due course. We presume that as soon as completed it will be sent in obedience to the writ of error.

We have never made the statement that it was not our intention to file the record in time for these motions.

We know nothing about the transcript filed by counsel except what may be learned from the index inserted at the beginning of the printed matter. If that is all that the record so filed contains it is not complete, and we do not believe that the clerk has certified it as a complete transcript of the record. The certificate of the clerk is not printed, and we have no knowledge on the subject. Very material parts of the record are omitted from this transcript which has been filed, all of which are absolutely necessary for the determination of these motions. The clerk of the Supreme Court of Illinois is not required, under this writ of error, to transmit the record until May 23, 1901. The court cannot hear and determine these motions without having the complete record on file and the parts material to this application printed. The application of the defendant in error to dismiss the writ or to affirm the judgment is, therefore, premature. It is said that this practice is expressly authorized in *Clark* v. *Hancock*, 94 U. S., 493.

In that case the final judgment was rendered on October 3, 1876, and the writ of error issued November 1, 1876, returnable to the October term, 1877, nearly one year after the issuing of the writ of error. In the present case the copy of the record must be filed within thirty days after the issuing of the writ of error, and there is no necessity for passing upon the motion at this time in order to prevent delays and expense. The transcript filed by the defendant in error is not a complete one, and should not be considered.

III.

THE MOTION TO DISMISS SHOULD BE DENIED FOR THE REASON THAT THE COURT HAS JURISDICTION IN THIS CASE.

It will be noticed that the motion to vacate the supersedeas and to dismiss the writ of error is not argued by counsel and no reason is presented in support of these motions, but every proposition discussed in the suggestions filed is directed to the question as to whether or not the Supreme Court of Illinois decided correctly in remanding the cause to the Superior Court of Cook County, Illinois, with directions to dismiss the bill of complaint, and whether or not the order of the state court was in conformity with the mandate of this court. The entire discussion has reference only to the motion to affirm on the ground that the writ of error was taken out for delay and that the questions presented are frivolous. It is conceded that the court has jurisdiction of this cause, and the motion to dismiss the writ of error should therefore be denied. The question as to whether the supersedeas should be vacated is controlled by the question as to whether the writ of error should be dismissed. If the writ of error is not dismissed the supersedeas should stand. If, on the other hand, the writ of error should be dismissed, the supersedeas would by that action of the court fail.

There is no question but that there is a Federal question involved in this case. The question is, whether the Supreme Court of Illinois has given proper effect to the judgment of this court reversing the judgment of the Supreme Court of Illinois. Such a question is a Federal question.

In the case of *Martin* v. *Hunter's Lessees*, 1 Wheaton, 562, which was a writ of error from the Court of Appeals of Virginia, founded upon the refusal of that court to obey the mandate of this court requiring the judgment rendered in the cause to be carried into due execution, the court, speaking through Mr. Justice Story, said:

"In causes remanded to the Circuit Courts if the mandate be not correctly executed, a writ of error or appeal has always been supposed to be a proper remedy and has been recognized as such in the former decisions of this court. The statute gives the same effect to writs of error from the judgments of state courts as of the Circuit Courts, and in its terms provides for proceedings where the same cause may be a second time brought up on writ of error to the Supreme Court. There is no limitation or description of the cases to which a second writ of error may be applied, and it ought therefore to be co-extensive with the cases which fall within the mischiefs of the statute."

In the case of *Perkins* v. *Fourniquet*, 14 How., 329, it was held that an appeal lies to this court to correct a mistake made by the Circuit Court in executing the mandate of this court.

In the case of *Hinckley* v. *Morton*, 103 U. S., 764, it was held that second appeals have always been allowed to bring up proceedings subsequent to the mandate and not settled by the terms of the mandate itself.

In the case of *Mackall* v. *Richards*, 112 U. S., 369, it was held that where a mandate of this court directed further proceedings to be had in the court below as would be consistent with right and justice, and the court below thereafter made a decree which prejudiced substantial rights of a party to the suit in respect of matters not concluded by the mandate, its action touching such matters is subject to review upon a second appeal.

In the case of *Crescent Live Stock Co.* v. *Butchers' Union*, 120 U. S., 141, the court said:

"It is argued by counsel for the defendant in error that this does not embrace any Federal question; that the effect to be given to a judgment or decree of the Circuit Court of the United States sitting in Louisiana by the courts of that state is to be determined by the law of Louisiana or by some principle of general law, as to which the decision of the state court is final, and that the ruling in question did not deprive plaintiffs in error of 'any privilege or immunity specially set up or claimed under the constitution or laws of the United States.' But this is an error. The question whether a state court has given due effect to a judgment of a court of the United States is a question arising under the constitution and laws of the United States and comes within the jurisdiction of the Federal courts by proper process, although, as was said by this court in *Dupessor* v. *Rochereau*, 21 Wallace, 130–135, 'No higher sanctity or effect can be claimed for the judgment of the Circuit Court of the United States rendered in such a case under such circumstances than is due to the judgment of the state courts in a like case and under similar circumstances. *Embry* v. *Palmer*, 107 U. S., 3.' It may be conceded that the judgment and decrees of the Circuit Court of the United States sitting in a particular state in the courts of that state are to be accorded such effect, and such effect only, as would be accorded in similar circumstances in a state tribunal of equal authority, but it is within the jurisdiction of this court to determine in this case whether such due effect has been given by the Supreme Court of Louisiana to the decrees of the Circuit Court of the United States here drawn in question."

In *In re Blake et al.*, 175 U. S., 114, it was held that writ of error is the proper remedy to test the question as to whether the state court correctly construed the opinion of this court.

That was a petition for mandamus to compel the Supreme Court of Tennessee to enter a certain decree in a case which had been appealed to this court, and which

judgment was by this court reversed and the cause remanded to the Supreme Court of Tennessee for further proceedings not inconsistent with the opinion. The plaintiffs in error insisted that the Supreme Court of Tennessee had not complied with the mandate of this court. It was held that a writ of mandamus could not issue to compel the Supreme Court of Tennessee to enter the decree desired by the plaintiffs in error, but that the remedy on error was the proper remedy. In an opinion by Chief Justice Fuller the court said:

"The writ of mandamus cannot be issued to compel a judicial tribunal to decide a matter within its discretion in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction nor to be used to perform the office of an appeal or writ of error. And it only lies as a general rule where there is no other adequate remedy. As respects the Federal court it is well settled that where the mandate leaves nothing to the judgment or discretion of the court below, and that court mistakes or misconstrues the decree or judgment of this court and does not give full effect to the mandate, its action may be controlled, either upon a new appeal or writ of error if involving a sufficient amount, or by writ of mandamus to execute the mandate of this court. *City Bank of Fort Worth* v. *Hunter*, 152 U. S., 512; *In re Sanford Fork and Tool Company*, 160 U. S., 247; *In re Potts*, 166 U. S., 263.

Nevertheless, without inquiring whether the conclusions of the Supreme Court of Tennessee were not in harmony with the views expressed by this court, we are of opinion that the remedy of petitioners for the alleged error in the decree of that court, if any, is by writ of error and not by mandamus. The remedy on error is not only entirely adequate and open to be sought unrestrained by the amount involved, but in respect of dealing with state tribunals is manifestly the proper remedy."

There being no question of the jurisdiction of the court, the motion to dismiss the writ of error and to vacate the supersedeas should be denied.

IV.

THERE IS NO COLOR FOR THE MOTION TO DISMISS, AND THE MOTION TO AFFIRM SHOULD NOT BE CONSIDERED.

When this case was here before on the writ of error taken out by the Farmers' Loan and Trust Company from the judgment of the Supreme Court of Illinois, a motion was made by this plaintiff in error, one of the defendants in error in that case, to dismiss the writ of error, and the same counsel who have filed the motion to dismiss the present writ of error or to affirm filed a brief in opposition to our motion to dismiss or affirm, in which they used the following language:

"Counsel have united with their motion to dismiss a motion to affirm under the rule authorizing such motion. The rule of court under which the motion is made provides that a motion to affirm may be joined with a motion to dismiss. It was not, however, the intention of this rule to give a party a right to simply make a written motion to dismiss and, adducing no reason or authority in support of it, immediately abandon it and hang upon it a motion to affirm. It is settled by a long line of decisions of this court that if there is no color for the motion to dismiss, that is, if this court clearly has jurisdiction of the writ of error the court will deny the motion to affirm without inquiring into the merits of the case. Otherwise, it would be in the power of a defendant in error in every case, by making a motion to dismiss and uniting with it a motion to affirm, to obtain a hearing and decision of this court upon the case in advance of its being reached on the docket and thus in effect advance the case by the motion to dismiss or affirm."

And counsel cited in support of this contention the following cases:

Whitney v. *Cook*, 99 U. S., 607.

School District v. *Hall*, 106 U. S., 428.
Davies v. *Corbin*, 113 U. S., 687.
New Orleans v. *L. C. Co.*, 129 U. S., 45.

We might cite in this connection the following additional authorities:

Metcalf v. *The Alaska*, 130 U. S., 201.
Walston v. *Nevin*, 128 U. S., 578.
Douglas v. *Wallace*, 161 U. S., 346.
Richards v. *Mackall*, 113 U. S., 539.

In *Whitney* v. *Cook*, 99 U. S., 607, the court said:

"This is a motion to affirm only. Our amended rule does allow a motion to affirm to be united with a motion to dismiss. This implies that there shall appear on the record at least some color of right to a dismissal. That is not pretended in this case. We are therefore compelled to deny the motion."

In *School District* v. *Hall*, 106 U. S., 428, the court said:

"There is not in this case such a color of right to a dismissal as to make it proper for us to consider the motion to affirm."

In *Davies* v. *Corbin*, 113 U. S., 687, the court said:

"The original rule allowing a motion to affirm to be united with a motion to dismiss was promulgated May 8, 1876, 91 U. S., VII, and in *Whitney* v. *Cook*, 99 U. S., 607, decided during the October term, 1878, it was ruled that the motion to affirm could not be entertained unless there appeared on the record at least some color of right to a dismissal. This practice has been adhered to ever since, and in our opinion prevents our entertaining the motion to affirm in this case. The motion is consequently denied."

In *New Orleans* v. *La. Construction Co.*, 129 U. S., 45, a motion was made to dismiss or affirm, and the court, after holding that the judgment was properly reviewable upon writ of error, said:

"The motion to dismiss is therefore denied, and as we do not think there was color for it, the motion to affirm must be denied also."

In the case of *The Alaska*, 130 U. S., 201, a motion was made to dismiss or affirm. The court held that there was sufficient color for the motion to dismiss and that therefore they were warranted in entertaining the motion to affirm.

In the case of *Walston* v. *Nevin*, 128 U. S., 578, it was held that the motion to dismiss could not be sustained, but it is expressly held by the court there was color for the motion, and that being so, they were permitted to inquire into the propriety of granting the motion to affirm.

In the case of *Douglas* v. *Wallace*, 161 U. S., 346, it was held that while the claim of a Federal question was not so clearly frivolous to to authorize the court to dismiss the case, still as there was color for the motion to dismiss, the court was anthorized to proceed with the consideration of the questions involved.

It is nowhere argued by counsel that there is any color for the motion to dismiss this writ of error, and the record nowhere shows that there are any facts in the case which give color to the motion to dismiss. In fact, under the authorities we have cited we have shown conclusively that there is no color for the motion.

It being conceded, therefore, that the court has jurisdiction of this writ of error. and it nowhere appearing that there is any color for the motion to dismiss, we insist that the court should deny the motion to affirm without inquiring into the merits of the case.

V.

THERE IS NO SHOWING MADE THAT THIS WRIT OF ERROR WAS TAKEN OUT MERELY FOR DELAY.

Even if the court should be of the opinion that there is color for the motion to dismiss, yet before it will entertain the motion to affirm it must be satisfied that the writ of error was taken out for delay, or else that the questions brought up by the writ of error are frivolous. The only statement made by counsel on the question of delay is that the entire history of the litigation, as it appears in the different opinions of the different courts, shows plainly that the object of the Superior Court suit was to prevent or delay the foreclosure case, and that from a general glance at the entire controversy this purpose in instituting and pressing the Superior Court case stands out prominent; that the present writ of error is but a continuation of that policy, and that, therefore, the motion to affirm on the ground that the writ of error is taken on frivolous grounds and for delay should be granted. There is nothing to show that the Superior Court case was instituted for the purpose of delaying or hindering the foreclosure suit. We insisted on the argument of the previous writ of error in this case that the bill in no way sought to interfere with the Federal court. The bill had absolutely nothing to do with the foreclosure suit. It was sought to remove the trustee on the ground that it had not complied with the laws of the State of Illinois, and also that it was abusing its powers, but whatever may have been the purpose of this bill the present writ of error in no way hinders or delays the Farmers' Loan and Trust Com-

pany in the prosecution of any litigation between it and this plaintiff in error. As soon as the mandate was issued from this court and long before the order now complained of was entered by the Supreme Court of Illinois, the Farmers' Loan and Trust Company made a motion before Judge Grosscup, of the United States Circuit Court, for the appointment of a receiver for the plaintiff in error. The matter was heard and taken under advisement by the court. Before any decision had been rendered The Lake Street Elevated Railroad Company settled the entire controversy with the bondholders who were pressing the foreclosure suit and in fact all litigation concerning the Lake Street Company and its cantankerous bondholders has been settled and the various suits dismissed. All of the bonds that were provided to be sealed have been deposited under the sealing arrangement. Not a single bondholder of the Lake Street Company desires the retention of the Farmers' Loan and Trust Company as trustee under this mortgage. The Farmers' Company, by its action in this matter, has placed upon the Lake Street Company an enormous burden which it would not have been compelled to bear if the Farmers' Company had justly and fairly acted in this matter according to the true interests of its *cestuis que trust* and the Lake Street Company. The foreclosure case is now on reference before Master in Chancery Bishop to determine simply and only the question of the amount of the fees due to the Farmers' Loan and Trust Company as counsel in the foreclosure litigation. When this is determined the foreclosure suit is to be dismissed. With the dismissal of the foreclosure case we are entitled to have this trustee stand from under and allow the bondholders and the *cestuis que trust* to have a trustee that will

fairly represent the various interests. The supersedeas granted in this case does not prevent it in any way from taking any steps it may desire to enforce the collection of its fees and allowances. 'n fact, testimony has been taken under this order of reference since the supersedeas was granted in this case. Its only office is to prevent the entry of the order in the Superior Court dismissing this bill. It does not tie the hands of the Farmers' Loan and Trust Company in any other way and is not productive of any delay whatever.

VI.

IT IS NOT SHOWN THAT THE QUESTIONS PRESENTED BY THIS WRIT OF ERROR ARE FRIVOLOUS.

The discussion of this question involves to a large extent a discussion of the merits of the case, and it will be necessary to refer to parts of the record that have not been filed or printed by the defendant in error. The essential facts in the case are as follows:

On the 30th day of January, 1896, The Lake Street Elevated Railroad Company filed its bill of complaint in the Superior Court of Cook County, Illinois, against the Farmers' Loan and Trust Company, the American Trust and Savings Bank and the Northern Trust Company, averring that it was incorporated under the general railroad act of the State of Illinois in August, 1892, and that on April 7, 1893, it made and delivered a certain mortgage or deed of trust to the American Trust and Savings Bank as trustee and the Farmers' Loan and Trust Company as co-trustee; that at the time said mortgage was made the Farmers' Loan and Trust Company had not or had it since complied with the laws of Illinois requiring a deposit with the au-

ditor of public accounts for the benefit of the creditors of said company of the sum of $200,000 in stocks of the United States or municipal bonds of this state, or in mortgages on improved and productive real estate of this state, in accordance with the statute in such case made and provided; that the Farmers' Loan and Trust Company was doing business in this state under and by virtue of the authority claimed to be vested in it under said mortgage; that under and by virtue of said mortgage there were certified and delivered to the Farmers' Loan and Trust Company and the American Trust and Savings Bank, trustees under said mortgage, 6,500 bonds of $1,000 each, and that additional bonds were issued under the provisions thereof. That since the making of said mortgage the complainant had built and was then operating a railroad in the City of Chicago, commonly known as an elevated railroad; that it had been unable to earn sufficient money in operating its said railroad to pay interest upon the indebtedness secured by said mortgage, and that one William Ziegler had been conspiring and confederating with various persons, altogether representing 610 bonds of the total issue of 7,574 bonds, and had made a demand upon the Farmers' Loan and Trust Company and the American Trust and Savings Bank to proceed to foreclose said mortgage by virtue of the powers contained therein, and that notwithstanding that no other person was asking or demanding any action or proceeding on behalf of the other bondholders than said 610 bonds, the Farmers' Loan and Trust Company proposed to and would proceed to file a bill to foreclose said mortgage. It was also alleged that it was the desire and wish of the holders of over 6,500 bonds of the complainant, issued under said trust deed, that the Farmers' Loan and Trust Company should take no action to foreclose the

same, but that it should be removed from its position as trustee under said mortgage; first, for failure to comply with the laws of Illinois; and second, for assuming to act or take proceedings under said mortgage contrary to and in violation of the request of the holders of the majority of the bonds issued under said mortgage. The prayer of the bill was, first, that said trustee might be removed and a new trustee appointed by the court to act under and by virtue of said mortgage or deed of trust in place of the Farmers' Loan and Trust Company; second, that an injunction *pendente lite* might be issued restraining and enjoining the Farmers' Loan and Trust Company from taking any proceedings or bringing or prosecuting any suits, or acting in any manner whatever under and by virtue of the terms, provisions and conditions of said mortgage; and that upon the final hearing said injunction might be made perpetual; and third, that the complainant might have such other, further and different relief as equity might require.

On January 31, 1896, the Farmers' Loan and Trust Company filed a petition and bond for the removal of said cause to the Circuit Court of the United States. This petition was denied, and afterwards the Farmers' Loan and Trust Company filed a general appearance and answer in said case.

The cause came on for trial in the Superior Court, and on the 4th day of June, 1896, a final decree was entered in said cause.

After finding the facts in the case, the decree ordered:

First, that the Farmers' Loan and Trust Company be and it was thereby removed as trustee or co-trustee under

the said mortgage or deed of trust executed and delivered by the complainant, The Lake Street Elevated Railroad Company.

Second, that the Farmers' Loan and Trust Company, its agents, attorneys, officers and servants, and each of them, be and they were thereby perpetually enjoined and restrained from taking any proceedings or bringing or prosecuting any suit or suits to foreclose said mortgage or trust deed from said complainant to said American Trust and Savings Bank and said Farmers' Loan and Trust Company, or acting in any manner whatsoever under and by virtue of the terms, provisions and conditions of said mortgage or deed of trust, so made, executed and delivered by the said complainant, The Lake Street Elevated Railroad Company, to said defendant, the American Trust and Savings Bank, as trustee, and the said defendant, the Farmers' Loan and Trust Company, as co-trustee.

Third, that the American Trust and Savings Bank, as trustee, do and it was thereby ordered and directed to appoint by an instrument in writing, within thirty days from the date of the entry of said decree, a co-trustee under the said mortgage or deed of trust, so made, executed and delivered by the complainant as aforesaid, in place of the said defendant, the Farmers' Loan and Trust Company, and that upon the appointment of such successor, such successor should, upon accepting said appointment, be and become vested with all the property rights, duties and trusts of the trustee named under said trust deed, and with all the right, title and interest of the said Farmers' Loan and Trust Company under said trust deed.

Fourth, that upon the failure of the American Trust and Savings Bank to make the appointment as aforesaid

within thirty days, the court reserved the power, right and authority to appoint a co-trustee as successor to the Farmers' Loan and Trust Company, and for the purposes aforesaid and for all other purposes deemed by the court necessary and proper, to enforce said decree and all the provisions thereof, the court expressly reserved unto itself jurisdiction of the cause and jurisdiction of all the parties thereto.

From this decree an appeal was taken by the Farmers' Loan and Trust Company to the Appellate Court of Illinois in and for the First District, where said decree was affirmed.

> *Farmers' Loan and Trust Company* v. *Lake Street Elevated Railroad Co.*, 68 Ill. App., 666.

From the judgment of the Appellate Court an appeal was taken to the Supreme Court of Illinois, where the judgment of the Appellate Court was affirmed on the 18th day of June, 1898.

> *Farmers' Loan and Trust Company* v. *Lake Street Elevated Railroad Co.*, 173 Ill., 439.

After the judgment had been affirmed by the Supreme Court of Illinois the order of affirmance of that court was duly filed as required by law, and thereupon and on the 24th day of June, 1898, after due notice to counsel for the Farmers Loan and Trust Company, the Superior Court of Cook County, Illinois, entered a supplemental decree confirming the appointment by the American Trust and Savings Bank of the Equitable Trust Company as co-trustee in place of the Farmers' Loan and Trust Company, and said The Equitable Trust Company was by said de-

cree vested with all the property, rights, duties and trusts of a trustee under said trust deed, with like effect as if named as trustee therein, and with all the right, title and interest of the Farmers' Loan and Trust Company under said trust deed.

After the entry of the supplemental decree by the Superior Court of Cook County, Illinois, the Farmers' Loan and Trust Company prosecuted a writ of error from this court to the Supreme Court of Illinois, and thereafter this court on March 26, 1900, reversed the judgment of the Supreme Court of Illinois affirming the original decree of the Superior Court of Cook County, Illinois; and remanded said cause to the Supreme Court of Illinois for proceedings not inconsistent with the opinion.

Farmers' Loan & Trust Co. v. *Lake Street Ele. R. R. Co.*, 177 U. S., 51.

On the 2nd day of March, 1901, the Farmers' Loan and Trust Company filed the mandate of this court in the office of the clerk of the Supreme Court of Illinois, and on April 10, 1901, moved the Supreme Court of Illinois to reverse its said judgment entered in this cause and to remand said cause to the Superior Court of Cook County, Illinois, with directions to dismiss the bill of complaint. On the 17th day of April, 1901, the Supreme Court of Illinois issued its mandate as prayed by the Farmers' Loan and Trust Company.

Our position is that the order of the Supreme Court of Illinois remanding the cause to the Superior Court of Cook County with directions to dismiss the bill is inconsistent with the opinion of this court in this cause, for the reason that the only matter decided was that the Supreme Court of Illinois erred in affirming the decree of the Su-

perior Court of Cook County, Illinois, only in so far as said decree enjoined the Farmers' Loan and Trust Company from prosecuting the bill of foreclosure which had been filed in the Circuit Court of the United States before the commencement of this suit in the state court. But that in so far as the other provisions of the decree of the Superior Court are concerned, they still remain in full force and effect. And further, that the effect of the order of the Supreme Court of Illinois directing the dismissal of the bill interferes with vested rights of third parties.

The Supreme Court of Illinois should only have directed the Superior Court to set aside that part of the decree enjoining the prosecution of the foreclosure suit pending in the Federal court.

An examination of the proceedings and opinions of the various courts which have rendered decisions in this cause will show that the question as to whether the Superior Court of Cook County, Illinois, had a right to retain jurisdiction over the cause was one of the questions involved. It was contended on behalf of the Farmers' Loan and Trust Company that because it had filed a petition and a bond for removal of the cause to the Circuit Court of the United States, the court had lost jurisdiction over the cause and its decree was a nullity.

This was the first point passed on by the Supreme Court of Illinois in its opinion, and it was held that there was no error in the action of the trial court in denying the petition for removal. Upon this question it is said in the opinion of the Supreme Court of the United States:

"Whether the state court erred in refusing to accept

the petition and bond filed by the plaintiff in error, the Farmers' Loan and Trust Company, for removal of the cause to the Circuit Court of the United States, and whether the Lake Street Elevated Railroad Company, the American Trust and Savings Bank and the Northern Trust Company, by appearing in the Circuit Court, by moving to remand, by demurring to the bill after such motion had been overruled, and by appealing to the Circuit Court of Appeals, were estopped from proceeding in the state court are questions which have been argued at length before us, but which, for reasons presently to be stated, we have not found it necessary to decide."

It will be seen that this court did not reverse the holding of the state court that the cause never was, in fact, removed to the Circuit Court of the United States and that the Superior Court had jurisdiction of the subject-matter and the parties.

t is argued by counsel that if this court was of the opinion that any part of the decree of the Superior Court should stand it would have been necessary to pass on the question whether or not the state court had jurisdiction after the petition and bond for removal had been filed, and as that question was not passed upon the entire decree was by this court set aside. This position is not tenable. In the first place, this court in refusing to pass on the question, affirmed the State Court on the question of its jurisdiction, and besides that the record shows that the Farmers' LoanLoan and Trust Company entered a general appearance after withdrawing its limited appearance filed under protest and filed an answer and submitted to the jurisdiction of the Superior Court. In the next place, it was not necessary for this court to pass on the question of removal in order that a part of the decree might be sustained. Counsel has fallen into the error of assuming that the subject-matter of the bill filed in the Superior

Court was the enjoining of the prosecution of the foreclosure suit. It is true that it was held by this court that the foreclosure case was prior in time, but it does not follow the Federal court had thereby acquired jurisdiction of the "entire matter" as counsel terms it, involved in the state court case.

We fail to find any holding in the opinion of this court that every question raised in the Superior Court case could have been and should have been raised by answer or cross-bill in the foreclosure suit pending in the Circuit Court of the United States, as argued by counsel. The holding was that the legal competency of the trustee to act as trustee in the foreclosure proceeding and the right and expediency of a foreclosure proceeding are the matters which can properly be raised and determined in the Circuit Court of the United States, but the bill filed in the Superior Court and the decree entered thereon was much more far-reaching. The bill not only attacked the legal competency of the trustee to act, but sought in addition to have it removed from office and to have a successor appointed, and the decree so ordered. The argumena of counsel is a virtual concession that the decree so far as the removal of the trustee and the appointment of a successor are concerned, should stand unaffected by the opinion of this court, if the matters set up in the bill could not be raised by answer or cross-bill in the foreclosure suit. It is clear that these matters could not be set up by answer for the reason that no affirmative relief can be granted to a defendant on an answer alone.

This has been decided in many cases in this state.

Tarleton v. *Vietes*, 1 Gilman, 470.
Edwards v. *Helm*, 4 Scam., 143.
McConnel v. *Hodson*, 2 Gilman, 640.

Mason v. *McGirr*, 28 Ill., 322.
McCagg v. *Heacock*, 42 Ill., 153.
Hanna v. *Ratekin*, 43 Ill., 462.
Tittsworth v. *Stout*, 49 Ill., 78.
Conwell v. *McCowen*, 53 Ill., 363.
Howett v. *Selby*, 54 Ill., 151.
International Bank v. *Wilshire*, 108 Ill., 143.
Anderson v. *Henderson*, 124 Ill., 164.

Neither could these matters be set up by cross-bill, because the only matters that can be investigated by a cross-bill are those that are germane to the original bill. While a defendant has a right to file a cross-bill and state new facts connected with the subject-matter of the original bill, yet the cross-bill must relate exclusively to the subject-matter of the bill and things connected therewith and foreign matter cannot be interposed.

Gage v. *Mayer*, 117 Ill., 632.
Lund v. *Skanes E. Bank*, 96 Ill., 181.
Morrison v. *Morrison*, 140 Ill., 560.

In Story on Equity Pleadings, Sec., 401, it is said:

"A cross-bill should not introduce new and distinct matters not embraced in the original suit, for as to such matters it is an original bill and they cannot properly be examined at the hearing of the first suit."

The only matter that could be raised by way of defense in the foreclosure suit and the only matter suggested by this court in its opinion as proper to be raised in that suit, was the competency of the trustee to act as complainant in that suit and its right to bring the foreclosure suit. If a defense of this kind was successful it would only result in an abatement of the suit and not the re-

moval of the Farmers' Loan and Trust Company as trustee and the appointment of a successor. This could only be done by another and independent proceeding. In other words, even if it had been held in the foreclosure suit that the Farmers' Loan and Trust Company was not authorized to bring the suit and that it was not expedient to enforce the provisions of the mortgage, that would not remove the trustee and appoint a successor.

The two suits did not relate to the same controversy. The one was a suit to foreclose a mortgage, the other to remove a trustee and appoint a successor. They were entirely distinct controversies. The Superior Court in the execution of its decree enjoined the prosecution of the foreclosure suit, and in that respect, and as held by this court, in that respect only, the decree was erroneous. The Federal court had the power to go on and determine all matters relating to the foreclosure of the mortgage. At the time the bill of foreclosure was filed the Farmers' Loan and Trust Company was the trustee under the mortgage, and it had the right to prosecute to a final determination all matters that had been put under way by it as trustee, notwithstanding the bill that had been filed to remove it, and irrespective of the final outcome of that case, and the mere fact that the Farmers' Loan and Trust Company had begun a prior suit in a Federal court is no reason why the railroad company had not the perfect right to have other and distinct controversies decided in the state court. The enforcement of the Superior Court decree, with the exception of that part enjoining the prosecution of the foreclosure suit, in no way hindered the Farmers' Loan and Trust Company from proceeding with the foreclosure and prosecuting it to a final determination. With the injunction out of the way, it is not,

as argued by counsel, removed *as complainant* in the foreclosure suit, even though it is removed as trustee under the mortgage. The decree does not affect what had been already done by the trustee as such, or the prosecution and determination of any suit begun by it as such trustee.

The question as to what mandate should have been issued to the Superior Court of Cook County in obedience to the opinion of this court must be determined on the assumption that the state court had full jurisdiction over the parties and the subject matter of the controversy. The subject-matter of the controversy was as to whether the Farmers' Loan and Trust Company should be removed as trustee under the mortgage and a new trustee appointed. Upon that subject nothing is said by this court.

It is manifest that the holding of the state court that the Farmers' Loan and Trust Company was properly removed as trustee for failure to comply with the statutes of the State of Illinois was not reversed. It was held that jurisdiction in the foreclosure proceedings had attached before the suit filed to remove the Farmers' Loan and Trust Company had been commenced, and that it was not competent for the state court to interfere by injunction with those proceedings. The language of the court on this question is as follows:

"As then the bill of foreclosure had been filed in the Circuit Court of the United States and the jurisdiction of that court has thus attached before the commencement of the suit in the state court, it follows upon principle and authority that it was not competent for the state court to interfere by injunction or otherwise with the proceedings of the Federal court."

That the judgment of the state court was erroneous in enjoining the Farmers' Loan and Trust Company from proceeding with the foreclosure suit and interfering with the proceedings of the Federal court was the only question decided.

After the decision of this court, a motion was made by the Farmers' Loan and Trust Company in the foreclosure suit for the appointment of a receiver. In disposing of that matter on May 28, 1900, and in referring to the litigation between the parties in this particular case, Judge Grosscup said:

"The case that was before the Supreme Court was an action that was brought in the Superior Court of this county to remove the Farmers' Loan and Trust Company as trustee, and to enjoin any proceedings by it in the way of foreclosure or otherwise that it might be about to take."

Showing that in the judgment of Judge Grosscup the proceeding involved two questions: First, the removal of the Farmers' Loan and Trust Company as trustee; and second, the enjoining of the foreclosure proceedings.

The court then said:

"Of course the case went to a decree in the Superior Court and was affirmed by the Appellate Court and was affirmed again by the Supreme Court, upon the theory that the state court had acquired jurisdiction prior to jurisdiction having been acquired by the Federal court in this foreclosure proceeding. The Supreme Court of the United States, in reviewing the action of the State Supreme Court, held that in that respect, at least, the state courts were in error; that the Federal court upon the foreclosure bill had obtained jurisdiction before the case was brought in the state court, and that therefore the case in the state court was an attempt to preclude the Federal court from proceeding with its foreclosure proceeding after it had obtained jurisdiction in the foreclosure case. For that reason the order of

the state court, as affirmed by the Supreme Court of the state, has been annulled by the Supreme Court of the United States. What is left of the state court order is not necessary for me now to determine. Whether if this proceeding should be discontinued that state court order would amount to an ouster of the Farmers' Loan and Trust Company as trustee, so that is could not bring a subsequent suit, I need not determine. That can be adjudged when the proper time comes. We are left then here in the situation of having jurisdiction of this case brought by the trustee to foreclose the mortgage for the non-payment of interest, and without any effectual impediment by reason of the action of the state court, so far as this suit is concerned."

It will be seen that Judge Grosscup held that the order of the state court enjoining the foreclosure proceeding was no longer an impediment.

There is only one clause in the decree of the Superior Court that in any way affects the foreclosure proceeding, and that is as follows:

"And it is further ordered, adjudged and decreed by the court that the said defendant, the Farmers' Loan and Trust Company, and its attorneys, solicitors, officers, agents and servants, and each and every of them, be and they are hereby perpetually enjoined and restrained from taking any procedure or bringing or prosecuting any suit or suits to foreclose said mortgage or trust deed from said complainant to said American Trust and Savings Bank and said Farmers' Loan and Trust Company, or acting in any manner whatsoever under and by virtue of the terms, provisions and conditions of said mortgage or deed of trust, so made, executed and delivered by the said complainant, The Lake Street Elevated Railroad Company, to the said defendant, the American Trust and Savings Bank, as trustee, and the said defendant, the Farmers' Loan and Trust Company, as co-trustee."

This is the only holding of the state court that has been reversed by the Supreme Court of the United States. In the conclusion of its opinion the court says:

"Our conclusion is that the Supreme Court of Illinois erred in its decree perpetually enjoining and restraining the Farmers' Loan and Trust Company, the plaintiff in error, from proceeding with or prosecuting teh said foreclosure suit in the Circuit Court of the United States and from acting in any manner whatsoever under and by virtue of the terms, provisions and conditions of the said mortgage; that the Appellate Court of the First District of Illinois erred in affirming said decree, and that the Supreme Court of Illinois erred in affirming the judgment of said Appellate Court. Accordingly the judgment of the Supreme Court of Illinois is reversed and the cause is remanded to that court for further proceedings not inconsistent with this opinion"

The error of the Supreme Court of Illinois was in restraining the Farmers' Loan and Trust Company from prosecuting the said foreclosure suit in the Circuit Court of the United States and from acting in any manner under the terms and provisions of said mortgage. It was not said or held that the Supreme Court of Illinois erred in ordering the trustee removed and a successor appointed. The only error was in the specific provision of the decree pointed out by this court.

This court did not pretend to reverse *in toto* the holding of the Supreme Court of Illinois. It only intended to and did reverse the holding of that court in so far as it affected the right of the Farmers' Loan and Trust Company to proceed with the foreclosure suit, and that only. The Superior Court of Cook County certainly had jurisdiction by due service of process and the entry of appearance by the Farmers' Loan and Trust Company over the parties and the subject-matter of the controversy. It declared that the trustee should be removed and a new trustee appointed. *If the foreclosure proceeding should proceed to final conclusion, and the property sold under a*

foreclosure decree, the appointment of a new trustee would be of no avail. But if the foreclosure proceeding should be dismissed or disposed of in any way without a sale of the property, then the trustee appointed under the decree of the Superior Court would be the acting trustee under the mortgage in place of the Farmers' Loan and Trust Company. As a matter of fact the scaling arrangement between the bondholders and the railroad company has now been completed, and the Northern Trust Company, the trustee under the scaling arrangement, is about to exchange the first mortgage bonds for the debenture bonds as provided for in that arrangement.

It would be the duty of the court to dismiss the foreclosure case upon payment of the interest past due. It was so held in *Bruce* v. *M. & K. R. R.*, 117 U. S., 514. Upon such dismissal the matter would stand as though no foreclosure bill had ever been filed.

As shown by the transcript, an order has been entered by Judge Grosscup in the foreclosure case referring the matter to a master in chancery solely and alone for the purpose of ascertaining the amount of fees due to the trustee in the foreclosure proceeding, upon the ascertainment and payment of which the court has announced that he would dismiss the foreclosure proceeding. Under these circumstances we are entitled to have the decree of the Superior Court stand, except in so far as it enjoined the prosecution of the foreclosure suit.

It is said by counsel that the judgment of this court is that the decree which removed the Farmers' Loan and Trust Company be reversed, and that if that decree is reversed that the Farmers' Loan and Trust Company is reinstated as trustee and there is no room for its successor. The opinion and mandate of this court does not

pretend to reinstate the Farmers' Loan and Trust Company as trustee, but only to allow it to proceed with the foreclosure suit, the prosecution of which was erroneously enjoined.

As this court did not pass upon the questions whether or not the state court had jurisdiction in the case and whether or not the Farmers' Loan and Trust Company was properly removed as trustee, except in so far as its removal affected the foreclosure suit pending in the Federal court, and as the finding of the lower court in these respects were not disapproved, it follows that those provisions of the decree still stand in full force, notwithstanding the contention of the defendant in error that the whole decree is reversed simply because the court used the word "reversed."

In *Gaines* v. *Rugg*, 148 U. S., 228, the Circuit Court of the United States entered a decree finding certain rent due plaintiff and that they recover of defendant possession of a certain lot, and that a writ of possession issue. The Supreme Court reversed this decree and ordered that the cause be remanded "for further proceedings to be had therein in conformity with the opinion of this court."

The Supreme Court held in its opinion (145 U. S., 141) that no error was committed by the Circuit Court in any matter relating to the possession of the land, but that error had been committed in the allowance of rent. The mandate was presented to the court below and a motion made for the entry of a decree. The court allowed defendant to take further testimony by way of defense to the title to the lot. On application for a writ of mandamus by plaintiff to compel the entry of the decree presented to the court, the Supreme Court said, at page 238:

"Because this court was dissatisfied with the decree in respect of the accounting, and only for that reason, it reversed the decree; but it remanded the causes to the Circuit Court with a direction, as the opinion and the mandate explicitly state, for further proceedings to be had there in conformity with the opinion of this court. It did not disturb the findings and decrees of the Circuit Court in regard to the title and possession, but only its disposition of the matter of accounting. The mandate and the opinion taken together, although they used the word 'reversed,' amount to reversal only in respect of the accounting and to a modification of the decree in respect of the accounting, and to an affirmance of it in all other respects."

And again at page 240:

"It is, we think, very plain that so much of the decree of the Circuit Court of November 11, 1887, as was not disapproved by this court still stands in full force."

So in the case at bar the decree of the Superior Court finding it had jurisdiction, and that the Farmers' Loan and Trust Company should be removed from its office, and so ordering, was not disapproved by this court and still stands in full force and effect, and should not have been disturbed by the Supreme Court of Illinois, and the Supreme Court of Illinois erred in setting them aside, except in so far as said decree enjoined the prosecution of the foreclosure case.

It seems clear from a reading of the opinion in the light of all the facts of the case, that this court could not have intended by its opinion and judgment to do more than relieve the Farmers' Loan and Trust Company from the injunction part of the decree, so that it would be at liberty to prosecute the foreclosure suit to an end. Upon a dismissal of the foreclosure suit, then the appointment of a successor to the Farmers' Loan and Trust Company must certainly stand. The foreclosure suit is

now ready for dismissal when the question of fees is settled. The Lake Street Company and its bondholders should not be compelled to again bring suit to remove the Farmers' Loan and Trust Company as trustee, and we cannot believe that this court so intended.

The effect of the order of the Supreme Court of Illinois directing the dismissal of the bill is to interfere with vested rights of third parties.

It will be seen by an examination of the transcript of record that the decree of June 4, 1896, was fully executed and carried into effect prior to July 7, 1898, when the former writ of error was allowed by Justice Brown, of the Supreme Court. The writ of error only operated as a supersedeas from the time the same was lodged with the clerk of the Supreme Court of Illinois, on August 2, 1898, or at least from the time it was served on the Lake Street Elevated Railroad Company on July 11, 1898; but in either event the proceedings in the cause had not been stayed, for the supplemental decree of the Superior Court of Cook County was entered before any application was made for a writ of error. The Equitable Trust Company cannot be divested of the rights vested in it by the supplemental decree, for the record was a sealed book before any order was made to hold the same in abeyance for further proceedings by the Supreme Court of the United States.

The former writ of error in this case was taken out by the Farmers' Loan and Trust Company under section 709 of the judiciary act of the Revised Statutes of the United States.

Section 1007 of the judiciary act of the Revised Statutes of the United States provides that in any case where a

writ of error may be made a supersedeas, the defendant may obtain such supersedeas by serving such writ of error by lodging a copy thereof for the adverse party in the clerk's office where the record remains within sixty days, Sundays inclusive, after the rendering of the judgment complained of and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment he may, having served his writ of error as aforesaid, give the security as required by law, within sixty days after the rendition of such judgment, or afterward with the permission of the justice or judge of the appellate court, and in such cases where a writ of error may be a supersedeas execution shall not issue until the expiration of the (said term of 60) (10) days.

It has been decided, however, that the section of the statute last referred to does not apply to judgments of a state court, but has reference only to the judgments of the courts of the United States.

In the case of *Doyle* v. *Wisconsin*, 94 U S., 50, the Supreme Court of Wisconsin, on the 15th day of August, 1876, rendered a judgment ordering that a writ of mandamus issue forthwith, directed to the plaintiff in error, commanding him within twenty-four hours to recall the license given by him to the Continental Insurance Company of the City of New York to do business in that state. The writ was issued and served on the same day, and on the next day its command was obeyed. On the 10th of October following the writ of error was sued out and a bond given to operate as a supersedeas. The plaintiff in error moved that all the proceedings in execution of the judgment within ten days after its rendition might be vacated and set aside. In an opinion by Chief Justice Waite the

Supreme Court held that the provision for delay in execution referred only to judgments and decrees in the courts of the United States, and that it was not the intention of Congress to interfere at all with the practice of state courts as to executions upon their judgments until a supersedeas was actually perfected, and the court held that inasmuch as the writ of mandamus was rightfully issued and served before the supersedeas was served, the motion must be denied.

See, also,

Foster v. *Kansas*, 112 U. S., 201.

It is clear under these authorities that The Lake Street Elevated Railroad Company had the right immediately upon the affirmance of the decree of the Superior Court of Cook County, by the Supreme Court of Illinois, to have all the provisions of that decree immediately enforced.

It is also equally clear that the rights vested in the Equitable Trust Company under the supplemental decree have not been divested by the partial reversal of the judgment of the Supreme Court of Illinois by this court.

The case of *Board of Commissioners* v. *Gorman*, 19 Wall., 661, came to the Supreme Court on error to the Supreme Court of the Territory of Idaho, in which the board of commissioners of Boise County and one Davis, plaintiffs in error, asked that a writ might be issued commanding restoration of the said Davis to the office of assessor and tax collector of Boise County, for the reason that he had been ousted from that office by virtue of a writ issued on the judgment in the court below after the allowance of the writ of error to the Supreme Court of the United States which operated as a supersedeas.

The court, after calling attention to the statute, which

provides that a writ of error may operate as a supersedeas when a copy has been lodged in the clerk's office where the record remains and that execution cannot issue upon the judgment until the expiration of ten days from the entry thereof, says:

"In this case the record shows that the judgment was actually entered on the 20th day of January. The entry as made was read in court on the morning of the 21st and the record signed by the judges, but it was ordered to be made on the 20th. The ten days, exclusive of Sundays, prescribed by the act of Congress for delay of execution, expired on Saturday, the 31st day of January. On Monday, the 2nd day of February, a majority of the judges of the court directed the clerk to issue a writ of restitution to carry the judgment into effect. On the same day the chief justice of the court allowed a writ of error and signed the necessary citation. A copy of the writ of error was filed in the clerk's office and the writ and citation actually served upon the defendant in error before the clerk had completed the preparation of the writ of restitution. After he had completed its preparation he handed it to the attorney for the defendant in error who had been previously served with the citation. No supersedeas bond was filed with the clerk on the 2nd and no notice was given that any had been approved. On the morning of the 3rd of February the writ of restitution was served and Davis removed from his office. After this and on the same day a bond approved by the chief justice was left in the clerk's office by him. It nowhere appears from the record when this bond was approved. It bears date the 2nd of February, but there is no certificate of the time when the approval was entered. It is certain, however, that it was not filed in the clerk's office until after service of the writ of restitution. The writ of error operated as a supersedeas only from such filing. That was too late to prevent the removal of Davis from his office in pursuance of the authority of the judgment, and we cannot now order him to be restored."

If, as held in the above case, the court was powerless to restore Davis, it must be held that the Supreme Court

of Illinois was powerless to restore the Farmers' Loan and Trust Company as trustee under the mortgage. The principle decided in the above case is to the effect that if the decree has been fully carried into effect before service of the citation the courts cannot and will not interfere, but will leave the parties as the law finds them. And as the law finds that the Equitable Trust Company was appointed as trustee instead of the Farmers' Company it cannot be removed.

Counsel have stated in their suggestions that we contended before the Supreme Court of Illinois that no revision of the decree was possible and that the court was powerless to take *any* action under the mandate of this court. It is perhaps unnecessary to say that this statement of counsel is not supported by the record for the reason that our brief filed in the Supreme Court of Illinois is not a part of the record in this court. We did, as a matter of fact, contend in that court, as we contend here, that the court should not order the bill dismissed but should set aside the decree only in so far as it enjoined the prosecution of the foreclosure suit, for two reasons: 1, Because this court did not order any other part of the decree set aside; 2, Because a dismissal of the bill would interfere with vested rights of third parties under the decree.

It is said that the supplemental transcript showing the appointment of the Equitable Trust Company as trustee in place of the Farmers' Loan and Trust Company before the prosecution of the writ of error from the final judgment of the Supreme Court of Illinois was not considered by the Supreme Court of Illinois, for the reason that the action of the Superior Court in attempting to appoint a successor was void on the ground that less than

ten days' notice was given of the motion to redocket the case and the entry of said order.

In the first place, it appears counsel for the Farmers' Loan and Trust Company was present in court when this order was entered and made no objection to the entry thereof. Any right that he had to additional time was therefore waived.

In the second place, the statute of Illinois does not require ten days' notice of an application to redocket a case and to enter orders where the judgment is affirmed, but only in cases where the judgment is reversed. The section of the statute referred to by counsel is as follows:

"When any cause or proceeding, either at law or in chancery, is remanded by the Supreme Court or Appellate Court, as the case may be, for a new trial or hearing by the court in which such cause was originally tried, the Supreme Court or Appellate Court, as the case may be, shall issue its mandate reversing and remanding such cause directly to such trial court and upon a transcript of the order of the Supreme Court or Appellate Court, as the case may be, remanding the same, being filed in the court in which such cause was originally tried, and not less than ten days notice thereof being given to the adverse party or his attorney, the cause or proceeding shall be reinstated therein. In the case of non-resident parties or parties who cannot be found so that personal notice cannot be served upon them, the notice may be given as in cases of chancery or as may be directed by the court. In cases of reversal and remandment by the Supreme Court of any cause removed thereto from the Appellate Court, upon the filing in such Appellate Court of certificate of such reversal and remandment, the clerk of the Appellate Court shall have the right to issue a fee bill for all such costs as accrued in said Appellate Court and did not abide the final action in the Supreme Court."

It will be seen that there is nothing in this section of the statute which applies in any way to judgments which

are affirmed by the Appellate or Supreme courts of this state. It is only when judgments are reversed that the ten days' notice is required to be given before the cause can be redocketed. As this judgment was not reversed by the Supreme Court of Illinois, but, on the other hand, affirmed, it follows that this statute does not apply to this case. The section of the statute which applies to a case of this kind is as follows:

"When an appeal or writ of error shall be prosecuted from a judgment, order or decree to the Supreme Court or Appellate Court, and such appeal or writ of error is dismissed, or the judgment, decree or order is affirmed, upon a copy of the order of the Supreme Court or Appellate Court, as the case may be, being filed in the office of the clerk of the court from which the case was originally removed, execution may issue and other proceedings may be had thereon in all respects as if no appeal or writ of error had been prosecuted."

Sec. 83, Ch. 110, Revised Statutes of Illinois.

After the certified copy of the order of affirmance by the Supreme Court of Illinois had been filed in the Appellate Court and in the Superior Court, it operated as a *procedendo* and reinvested the Superior Court with jurisdiction to proceed in the cause in all respects as though no writ of error had been prosecuted.

Smith v. *Stevens*, 133 Ill., 183.
People v. *Wadlow*, 166 Ill., 119.
Rock Island National Bank v. *Thompson*, 173 Ill., 593 (611).

It will be seen, therefore, that the Lake Street Elevated Railroad Company had the right, immediately upon the filing of the order of affirmance in the Superior Court, to apply for the entry of this order, as if no appeal or

writ of error had been prosecuted. It cannot, therefoer, be contended that the Superior Court was without any jurisdiction at the time the supplemental decree appointing a new trustee was entered.

It is claimed by counsel for the defendant in error that the Equitable Trust Company obtained no rights under the decree entered after the judgment of the Supreme Court of Illinois for two reasons:

1st. Because it was not a *bona fide* purchaser for value;

2nd. Because the only title a party to the suit acquires is a voidable title subject to be defeated by the reversal of the decree.

Neither of these contentions can be sustained. The Equitable Trust Company stands in exactly the position of a *bona fide* purchaser for value. It is well settled that if the judgment is reversed the parties are to be restored to their original rights *so far as it can be done without prejudice to third persons*, but the rights of third persons are not affected and their title acquired to property under an erroneous judgment is not divested by the reversal, and this principle is extended not only to purchasers but to cases where legal rights have become vested although no sale has been made, which is the case here. This principle has been decided in several cases in this state.

In *Wadhams* v. *Gay*, 73 Ill., 415, the court said, in passing on this question:

"Nor is this principle confined to the case of judicial sales as being founded on the public policy of sustaining such sales. The same principle applies to judgments and decrees which simply declare and vest the legal title in the party claiming it where no sale has been made."

The same principle is reaffirmed in the case of *Hay* v.

Bennett, 153 Ill., 271, in which case the court said, on page 287:

"The ground of the decision in *Goudy* v. *Hall* (36 Ill., 313) was that since the Circuit Court had jurisdiction of the persons in interest and subject-matter, it was of no moment how erroneous the proceedings of the court may have been, the rights of third persons acquired under such proceedings were unreversed and, by virtue of them, must be protected. (See the subsequent case of *Wadhams et al.* v. *Gay*, 73 Ill., 415, and the numerous authorities there cited.) It was there in substance said that where a judgment or decree has been reversed, then, as between the parties to the litigation, they are all to be restored to their original rights, but that the rights of third persons are not affected, and, also, that this principle is not confined to the cases of judicial sales, but that it applies to judgments and decrees which simply declare and vest the legal title in the party claiming it."

See, also,

Montanye v. *Wallahan*, 84 Ill., 355.
Mulvey v. *Gibbons*, 87 Ill., 367.
Hannas v. *Hannas*, 110 Ill., 53.
Lambert v. *Livingstone*, 131 Ill., 161.
Hammond v. *People*, 178 Ill., 503.

So far as the other contention advanced by counsel is concerned, it is sufficient answer to say that the Equitable Trust Company was not and never has been a party to this suit. In addition to that fact, neither the Equitable Trust Company, nor any of the parties to the suit, had any notice at the time the supplemental decree was entered that the Farmers' Loan and Trust Company would apply for a writ of error from this court to the Supreme Court of Illinois to review the judgment of that court. The decree vesting title under the mortgage in the Equitable Trust Company was entered several days before any notice of application was given by the Farmers' Loan and Trust

Company that it would apply to this court for a writ of error. The Equitable Trust Company accepted the trust in reliance upon the absolute title given by the decree. It is true that in considering this question the date of the supersedeas obtained by the Farmers' Loan and Trust Company is immaterial, and it is also true that a writ of error is none the less *lis pendens* because there is no supersedeas, but in this case there was neither a writ of error nor a supersedeas nor any notice of an intention to apply for them until long after the supplemental decree was entered and the title to the property vested in the Equitable Trust Company.

When the case was here before, the supplemental decree entered before the former writ of error was allowed, which appointed the Equitable Trust Company as trustee in place of the Farmers' Loan and Trust Company, was not in the record and not before the court, the record embracing only the matters up to and including the judgment of the Supreme Court affirming the original decree. It might be that the court would not have reversed the Supreme Court of Illinois had the supplemental decree been before it. The supplemental decree is now before the court, and if the court should now be of the opinion that the judgment of the Supreme Court of Illinois should not be disturbed as the rights of third parties have intervened, then it is within the power of the court to recall the mandate already issued to the Supreme Court of Illinois, and to enter such an order in the case as it would have entered if the supplemental decree had been before it on the former writ of error.

It is finally argued by counsel that in any view the order to the Supreme Court of Illinois was not inconsist-

ent with the opinion of this court, for the reason that the Illinois Supreme Court was at liberty in remanding the cause to the Superior Court to give it such directions as it thought best; that this court left it entirely within the discretion of the Supreme Court of Illinois as to what order should be entered, so long as it was not inconsistent with its opinion, and that as the action taken was not inconsistent with the opinion of this court, this court cannot review that action even though it went further and was more radical than this court contemplated.

In the first place the order directing the dismissal of the bill *is* inconsistent with the opinion of this court as we have shown, and in the next place the Supreme Court of Illinois did not pretend in its remanding order to exercise any discretion whatever. Its order recites that the cause came on to be heard on the motion of the Farmers' Loan and Trust Company to reverse the judgment of the Appellate Court and the decree of the Superior Court and remand the cause, and it appearing that the Supreme Court of the United States did enter a certain order (here follows the mandate of this court *in hæc verba*), therefore *in obedience to said mandate and in compliance therewith*, it is considered by the court that the judgment of the Appellate Court and the decree of the Superior Court in this behalf rendered be reversed, annulled, set aside and wholly for nothing esteemed, and that this cause be remanded to the Superior Court of Cook County with directions to dismiss the bill. No opinion whatever was rendered by the court and it simply did what it considered a ministerial act in entering the remanding order. It simply states that in obedience to the mandate and in compliance therewith the cause is remanded with directions to dismiss the bill.

In view of what we regard as good reasons for our position, the merits of this case are not properly before the court on this motion, and in view also of the limited time at our disposal, we have not submitted to the court the full argument we think necessary to properly present the merits of this controversy. In fact, on this motion we regard it as improper so to do.

We respectfully submit that the motions made by the defendant in error to dismiss the writ of error, to vacate the supersedeas, or to affirm the judgment, should be denied.

Respectfully submitted.

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Attorney for Plaintiff in Error.